APPEAL NO. 990692

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 8, 1999. He (hearing officer) determined that the respondent (carrier) was relieved of liability for a portion of 17th quarter supplemental income benefits (SIBS) because of the appellant's (claimant) late filing of a Statement of Employment Status (TWCC-52) and that the claimant was entitled to reimbursement for mileage for travel to a hospital and rehabilitation center, but not for travel to a pharmacy and a medical supply house. The claimant appeals the adverse determinations, expressing his disagreement with them. The carrier replies that the decision is correct, supported by sufficient evidence, and should be affirmed, with the exceptions that the mileage rate be amended from 28 cents per mile to the rate of 26 cents per mile effective in 1996 and that the travel expenses to the hospital not be approved because these services were not preauthorized. These points of appeal were included in the response to the claimant's appeal, which was timely as a response, but not as an appeal. The mileage rate determination and award of travel expenses to the hospital have, thus, become final. Section 410.169.

DECISION

Affirmed.

The claimant sustained a compensable low back injury on _____. The parties stipulated that he was entitled to SIBS for the 17th quarter, which began on September 10, 1998. The claimant testified that he received a TWCC-52 from the carrier for this quarter and completed it on August 26, 1998. He also said that his wife mailed the form to the carrier the next day in an envelope provided by the carrier. Although his wife did not testify, the claimant said she did not mail it certified or return receipt requested because she was running late and just dropped it in the mailbox for the late pickup. He said he customarily sent his TWCC-52 by regular mail except on a few occasions beginning in 1998 when, he said, the mail had gotten lost. When he did not receive his check for the first month of 17th quarter SIBS, the claimant said he became concerned and called the adjuster who advised him that the TWCC-52 had not been received and urged him to immediately fax a copy to the carrier. The claimant said he did this on October 7, 1998, and SIBS payments were resumed.

Section 408.143 provides that an employee seeking post-first quarter SIBS must file a statement (TWCC-52) with the carrier. Failure to timely file the statement relieves the carrier of liability for SIBS during the period of time the statement is late. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104(c) (Rule 130.104(c)) further provides that the employee "shall file the statement with the carrier by first class mail or personal delivery." The claimant argued that he complied with these provisions in the manner selected by the carrier, that is, by regular mail in a carrier-supplied envelope and that the carrier, in fact, received the mailing, despite its assertion to the contrary at the CCH. For proof of actual receipt by mail, the claimant submitted that the copy of the TWCC-52 with attachments

introduced at the CCH clearly indicates that it was faxed to the carrier on October 7, 1998, except for the calculation worksheet, which does not bear the fax annotation that the other pages have. The claims representative handling this matter submitted a written statement, which was introduced into evidence, wherein she said this calculation sheet did not arrive with the fax and she simply completed a blank one she already had so as not to delay SIBS payments any longer. The carrier also pointed out that the pages were sequentially numbered by the fax machine and the number which should have been assigned to the calculation sheet was not missing, but was on the next page.

The hearing officer found that the claimant's wife mailed the TWCC-52 for 17th quarter SIBS on August 27, 1998; that the carrier never received the mailing; and that a TWCC-52 for this quarter was first received by fax on October 7, 1998. Given these findings, he concluded that the carrier was relieved of liability for 17th quarter SIBS for the 28 days that the TWCC-52 was late. In his discussion of the evidence, he rejected the claimant's argument that the numbering of the pages of the fax and the carrier's use of an unnumbered calculation sheet proved the carrier really did receive the mailing in favor of the claims representative's explanation of her use of the calculation sheet. Whether the carrier received the TWCC-52 mailed on August 27, 1998, was a question of fact for the hearing officer to decide. The hearing officer was the sole judge of the weight and credibility of the evidence on this question. Section 410.165(a). He found the carrier's evidence more credible than the speculations of the claimant as to whether the mailing was received. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the determination that the TWCC-52, though mailed, was not received by the carrier.

The hearing officer also provided the following explanation for his findings:

> The original TWCC-52 was placed in the mail system, but apparently got lost in the mail system . . . . Since the Claimant used the mail, the postal system became his agent, not the Carrier's. Any such loss is not imputed to the Carrier, but to the Claimant. The [1989 Act] requires the TWCC-52 to be "filed" with the Carrier, which means received by the Carrier, not sent by the Claimant. (Emphasis in original.)

In support of this proposition, the hearing officer relied on our decision in Texas Workers' Compensation Commission Appeal No. 951264, decided September 8, 1995. That case, in turn, relied on our decision in Texas Workers' Compensation Commission Appeal No. 950773, decided June 29, 1995 (Unpublished) for the proposition that a carrier did not meet the requirement to request a CCH to dispute SIBS entitlement simply by placing the request in the mail to the Texas Workers' Compensation Commission without regard to when the request was received. This principle was noted to apply equally to carriers and employees in SIBS cases where documents are to be filed within a specific number of days. In Texas

Workers' Compensation Commission Appeal No. 971474, decided September 10, 1997, we stated that "a communication in SIBS cases must be received."

The claimant does not take issue with this statement of law, but with the assertion that the postal system was his agent. To the contrary, he argues that he was only using an envelope provided by the carrier and that this made the postal service the agent of the carrier and that the carrier should bear any loss associated with the failure of this agent to deliver the mail.

We are not persuaded by the claimant's argument that the mere inclusion of a self-addressed envelope with the TWCC-52 made the postal service the carrier's agent in this case. Indeed, given the unpredictability of the weight of the TWCC-52 with attachments, a carrier would face the near impossible job of anticipating the correct postage to avoid the delay of a return to the claimant for insufficient postage. In our opinion, the inclusion of the envelope was no more than a convenience for the claimant if he chose to use it. It remained his decision to use regular mail or certified mail with a return receipt requested. Our holding in this case furthers the purpose of timely addressing and deciding entitlement to SIBS that we stressed in Appeal No. 951264, *supra*.

The claimant appeals the denial of travel expenses for his trips to a pharmacy and medical supply house. The hearing officer relied on our decisions in Texas Workers' Compensation Commission Appeal No. 93441, decided July 16, 1993, and Texas Workers' Compensation Commission Appeal No. 972500, decided January 15, 1998, for the proposition that travel reimbursement under Rule 134.6 is provided for medical care only and that pharmacies do not provide medical care as contemplated by this rule. We analogize the trip to obtain a medical device to be similar to a trip to a pharmacy for medication. Pursuant to existing precedent, the claimant was not entitled to mileage reimbursement for these trips.

Finally, the claimant argues on appeal that the hearing officer failed to consider an award of travel reimbursement for 10 trips to see Dr. H. At the CCH, the claimant introduced numerous documents relating to travel expenses and some reimbursements. In large measure, these documents created substantial confusion over what was being sought and what had actually been paid. In any case, the claimant was adamant at the CCH that he was seeking reimbursement only for the pharmacy and medical supply house trips and for the trips to the hospital in 1996 and to the rehabilitation center. The hearing officer decided in accordance with this testimony. Given these representations at the CCH, we find no error in the hearing officer's failure to address reimbursement for the visits to Dr. H.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Judy L. Stephens
Appeals Judge